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No. 370

In the Supreme Court of the United States

OCTOBER TERM, 1930

J. W. ALFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Summary of argument	5
Argument:	
I. It was not necessary to prove all details of the scheme to defraud precisely as laid in the indictment	7
II. Reversible error was not committed by the trial court in sustaining an objection to the question "Where do you live?" asked by petitioner's counsel in cross-examination of a witness	12
III. No error was committed in refusing to grant petitioner's requested instruction No. 10	18
IV. No prejudicial error was committed by the trial court in that part of its charge which mentioned representations regarding petitioner's ownership of the land involved	23
Conclusion	28
Appendix (Statute involved)	29

CITATIONS

Cases:

Bain, Ex parte, 121 U. S. 1	12
Benham v. *United States*, 13 F. (2d) 558, certiorari denied, 273 U. S. 721	12
Blitz v. *United States*, 153 U. S. 308	17
Bowers v. *United States*, 244 Fed. 641	27
Burns v. *United States*, 274 U. S. 328	24
Cochran v. *United States*, 157 U. S. 286	17
Cool v. *United States*, 35 F. (2d) 794	12
Edwards v. *United States*, 18 F. (2d) 402	17
Ford v. *United States*, 273 U. S. 593	12
Gardner v. *United States*, 230 Fed. 575	9
Glover v. *United States*, 147 Fed. 426	16
Horn v. *United States*, 182 Fed. 721	9
Johnson v. *Jones*, 1 Black 209	17
Kaplan v. *United States*, 18 F. (2d) 939	12
Lennon v. *United States*, 20 F. (2d) 490	17

Cases—Continued.

	Page
Lewis v. *United States*, 38 F. (2d) 406	12
Massenberg v. *United States*, 19 F. (2d) 62	17
Mathews v. *United States*, 15 F. (2d) 139	**9, 12**
Naftzger v. *United States*, 200 Fed. 494	12
Northern Pacific Railroad v. *Babcock*, 154 U. S. 190	24
Redmond v. *United States*, 8 F. (2d) 24	9
Salinger v. *United States*, 272 U. S. 542	10, 11, 12
Savage v. *United States*, 270 Fed. 14	9
Sawyer v. *United States*, 27 F. (2d) 569	17
Silkworth v. *United States*, 10 F. (2d) 711	11
Sugarman v. *United States*, 249 U. S. 182	22
Tia-Koo-Yel-Lee v. *United States*, 167 U. S. 274	7
United States v. *Dembowski*, 272 Fed. 894	12

Statute:

Criminal Code, Sec. 215, c. 321, 35 Stat. 1088, 1130–1131	2

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OPINION BELOW

The majority opinion of the Circuit Court of Appeals (R. 492) and the dissenting opinion (R. 503) are reported in 41 F. (2d) 157.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 26, 1930. (R. 506.) A petition for rehearing was denied on June 26, 1930. (R. 507.) Petition for certiorari was filed August 21, 1930, and granted October 20, 1930, pursuant to the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in the trial of an indictment for using the mails to defraud, the scheme to defraud, as charged in the indictment, was sufficiently proved although the court withdrew from the jury all evidence relative to certain allegations of the indictment.

2. Whether reversible error was committed in denying the petitioner's counsel the right to inquire of a witness on cross-examination where he then lived.

3. Whether reversible error was committed in refusing to give to the jury a requested instruction to the effect that there must be evidence to establish the fact that the defendant knew at the time of making promises that they would not be fulfilled, when, as the Government contends, this point was fully covered elsewhere in the charge.

4. Whether, in view of the fact that the indictment did not specifically allege that petitioner made false representations as to ownership of land, the court erred in instructing the jury that if the petitioner made false representations as to his ownership of land, a subsequent ultimate intent to reimburse the investor or investors would by no means furnish a condonation or legal excuse for the false representations.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Cali-

fornia on four counts of an indictment charging him with using the mails in furtherance of a scheme to defraud. (R. 3, 68–69.)

The District Court imposed a sentence of five years' imprisonment and a fine of $1,000 on the first count, imprisonment of two years and a fine of $1,000 on the second count, and imprisonment of two years (without fine) on the fifth and sixth counts, the terms of imprisonment on all counts to run concurrently. (R. 406.) The Circuit Court of Appeals affirmed the judgment, stating that it was unnecessary to consider the evidence as to the fifth and sixth counts, as "the sentences thereon run concurrently with the sentence under counts 1 and 2 and are for a shorter period." (R. 503.) The contentions of petitioner relate equally to both counts 1 and 2.

The object of the scheme, the indictment charged, was to obtain money as the purchase price of parcels of land represented by the petitioner as potential oil land. The indictment charged many details of the scheme to defraud. It alleged that the petitioner intended to sell the parcels in question without having title thereto; that he had an option on the land but that he did not intend to exercise it; that he represented that he would spend $300,000 in drilling oil wells on the land, although he really did not intend to drill any oil wells; and that he stated that he would deliver to the pur-

chasers deeds giving title to the land although he did not intend to deliver any deed.

The indictment also alleged that it was part of the scheme of the petitioner to represent to his victims after they had made the purchases that he would permit them to exchange the land bought by them for interests in a syndicate owning other tracts of land, although he did not intend to obtain any such other tracts. Upon motion of the petitioner, the trial court eliminated all testimony as to the representations regarding this syndicate on the ground that the evidence did not show that the plan in regard to it was formulated at the same time as the original plan to defraud.

There was evidence tending to show that petitioner obtained an option to purchase for $307,200 a thirty thousand acre tract of land in Oklahoma, to be split up into acre tracts and sold to the public as potential oil lands. (R. 82, 104.) Of the purchase price he made only the first payment—$25,000—and he made that with borrowed money which was never repaid. (R. 83, 85, 90, 181, 356.) He was compelled to deed his entire interest to the person who made the loan. (R. 318–319.) Purchasers from him, on completing their instalment payments, were unable to get deeds. (R. 104, 109, 146–147, 149, 151, 152–153, 161, 172, 174, 212, 219, 235.) There were also false promises as to early drilling of oil wells and as to the expenditure of a large sum of money in such activity and in improv-

ing the land. (R. 122, 140, 147, 150, 151, 159, 163, 169, 171, 180, 211, 218.) Petitioner permitted his sales campaign to continue when he knew that his enterprise had collapsed. (R. 128.)

As the Circuit Court of Appeals said (R. 494):

> * * * The evidence shows without any conflict that the appellant made the false representation that he was actually drilling a well. The jury were justified from the evidence in concluding that the appellant never intended to drill the well. They were also justified in concluding from the evidence that the appellant did not intend to convey the land he agreed to sell. * * *

SUMMARY OF ARGUMENT

1. The failure of the Government to prove certain allegations of the indictment as to the scheme to defraud does not invalidate the conviction. In prosecutions for mail frauds under Section 215 of the Criminal Code, the gist of the offense is the use of the mails. The fraudulent scheme is not the substantive offense, and it need be alleged only with sufficient particularity to apprise the defendant fairly of the nature of the scheme charged. Upon the trial the Government is not required to prove all of the alleged particulars and manifestations of the scheme, but only enough of them to establish a substantial scheme or artifice. A failure of proof as to a particular factual element of the pleaded scheme does not amount to a conviction upon a changed or amended indictment.

2. Reversible error was not committed by the trial court in sustaining an objection to the question, "Where do you live?" asked by petitioner's counsel in cross-examination of a witness. That question is not a sufficient basis upon which to predicate an attack upon the credibility, prejudice, or bias of the witness. Nor can such a question form a proper basis for an attempt to show that the witness was then in the custody of the Federal authorities. The fact—if it was a fact—that the witness was in the custody of the Federal authorities did not affect his credibility or show bias on his part. Moreover, the extent of an attack upon credibility, upon cross-examination, is always in the sound discretion of the trial court, which discretion is not subject to attack upon appeal unless grossly abused. No such abuse appears here, and no prejudice is shown to exist by reason of the refusal of the trial court to permit the question to be answered.

3. Reversible error was not committed by the trial court in refusing to give the jury a particular instruction requested by the defendant, to the effect that the fact that a promise was not fulfilled by petitioner was not sufficient to establish that he did not intend to fulfill the promise. The charge of the court, considered as a whole, fully and clearly covered the question of intent.

4. The reference in the charge of the court to a theory of fraudulent representations based upon alleged *ownership* of land involved is not reversible

error, first, because the entire charge clearly and fully apprised the jury of the elements of the offense set forth in the indictment and the proofs; and secondly, because the indictment, in effect, charges that the petitioner had represented that he would become the owner of the land which he was attempting to sell under his fraudulent scheme.

ARGUMENT

I

IT WAS NOT NECESSARY TO PROVE ALL DETAILS OF THE SCHEME TO DEFRAUD PRECISELY AS LAID IN THE INDICTMENT

The indictment in this case (R. 3–15) follows the form of indictment which is commonly used in prosecutions for using the mails to defraud. At the outset, it charges that the defendant "did devise a scheme and artifice to obtain money and property by means of false and fraudulent pretenses, representations and promises." It then proceeds to identify the scheme and artifice by recitals of particulars. Each of these particulars is referred to in the indictment as a further "part of said scheme and artifice" to defraud.

The first eight particulars of the scheme set forth in the first count (R. 3–9) may be summarized as follows: Petitioner, having secured an option on some Oklahoma land, which he never intended to exercise, represented that the land was potential oil land, that he intended to expend approximately

$300,000 in drilling oil wells on it, and that he would give deeds of lots to purchasers from him, all of which representations were intentionally false and were made for the purpose of defrauding persons who might be induced to pay money to petitioner in reliance on such representations. The last four particulars set forth in the indictment allege that petitioner as "a part of said scheme and artifice," intended, in effect, to induce the already defrauded purchasers to transfer their supposed investments to another investment sponsored by petitioner, known as the "Ten Way to Win Syndicate," in connection with which he would represent that the "Ten Way to Win Syndicate" was organized for the protection of the purchasers, and would enable the purchaser to own lands upon which petitioner intended to drill oil wells, at his own expense.

Upon the trial, the evidence showed that petitioner's idea in advancing the "Ten Way To Win Syndicate" proposition was formulated by him after the date of the concoction of the scheme embracing the first eight particulars referred to above. Petitioner, therefore, moved to strike out such evidence, upon the ground that it could not have been part of the original scheme to defraud. The court granted the motion, and withdrew the evidence of the "Ten Way To Win Syndicate" proposition from the jury, and the case proceeded. Petitioner was convicted upon evidence amply supporting the

allegations of the indictment as to the first eight particulars referred to above.

The petitioner contends that as the "Ten Way To Win Syndicate" proposition was charged in the indictment to have been "a part of said scheme and artifice," he was in effect tried on a charge different from that set forth in the indictment, in violation of the provisions of the Fifth Amendment.

The contention is neither novel nor sound. It grows out of a failure to appreciate the nature of the crime laid in the pertinent statute, Section 215 of the Criminal Code (p. 29, *infra*). The gist of the offense is the use of the mails in furtherance of a scheme to defraud. The scheme itself is not the substantive offense, and the rule, therefore, is that the scheme need not be set forth with all the particularity required in charging a substantive offense, but need be described only with sufficient particularity to apprise the defendant of the nature of the scheme with which he is charged. *Mathews* v. *United States* 15 F. (2d) 139, 143 (C. C. A. 8th); *Redmond* v. *United States* (C. C. A. 1st), 8 F. (2d) 24; *Savage* v. *United States* (C. C. A. 8th), 270 Fed. 14; *Gardner* v. *United States* (C. C. A. 8th), 230 Fed. 575; *Horn* v. *United States* (C. C. A. 8th) 182 Fed. 721.

Obviously the pleader in setting forth such a scheme should include the various particulars which, upon his information, he believes that the Government may prove for the purpose of establishing

that there was a scheme to defraud. Owing to the ramifications into which such schemes extend, it is impossible for the pleader before the trial to select with absolute certainty those of the numerous intentions and acts which the prosecution will be able to prove. To require this would place an insuperable burden upon the Government in such prosecutions.

We contend that the action of the trial court did not operate in effect, as petitioner contends, as an amendment to the indictment. In *Salinger* v. *United States*, 272 U. S. 542, 548–549, a case involving a similar situation, this Court said:

> The contention that the court, by withdrawing from the jury a part of the charge as without support in the evidence, amended the indictment and thereby prevented it from longer serving as an accusation by a grand jury is on no better plane than the others. The indictment was not amended, either actually or in legal effect. It remained just as it was returned by the grand jury, and the trial was on the charge preferred in it and not on a modified charge. After the evidence was put in, the accused, believing that part of the charge had no support in the evidence, requested that that part be withdrawn from the jury; and the court acceded to the request when the final instructions were given. The scheme to defraud as set forth in the indictment was manifold in that it comprehended several relatively dis-

> tinct plans for fleecing intended victims. What the court withdrew from the jury was all of these plans but one. Thus the court ruled that the evidence while tending to sustain the charge as respects one of the plans did not give it any support as respects the others. Whether this was right or wrong—as to which we intimate no opinion—it did not work an amendment of the indictment and was not even remotely an infraction of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." *Goto* v. *Lane*, 265 U. S. 393; *State* v. *Evans*, 40 La. Ann. 216, 218. And see *Crain* v. *United States*, 162 U. S. 625, 636; *Hall*. v. *United States*, 168 U. S. 632, 638–639. In the case of *Ex Parte Bain*, 121 U. S. 1, on which the accused relies, there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury. The principle on which the decision proceeded is not broader than the situation to which it was applied.

The same result was reached in *Silkworth* v. *United States* (C. C. A. 2d), 10 F. (2d) 711.

Although it is necessary to prove a sufficient number of the elements of the scheme to show its existence, it has often been held that no particular element need be proved if the elements which are proved are sufficient to establish the scheme. *Lewis*

v. *United States* (C. C. A. 9th), 38 F. (2d) 406, 409–410; *Cowl* v. *United States* (C. C. A. 8th), 35 F. (2d) 794, 798; *Kaplan* v. *United States* (C. C. A. 2d), 18 F. (2d) 939, 943; *Mathews* v. *United States* (C. C. A. 8th), 15 F. (2d) 139, 143–144; *Benham* v. *United States* (C. C. A. 6th), 13 F. (2d) 558, certiorari denied, 273 U. S. 721. See also *Ford* v. *United States*, 273 U. S. 593, 602.

The contention of the petitioner that such cases as *Ex parte Bain*, 121 U. S. 1; *Naftzger* v. *United States* (C. C. A. 8th), 200 Fed. 494; *United States* v. *Dembowski* (D. C., E. D. Mich.), 252 Fed. 894, are controlling here, illustrates the error into which he has fallen. These cases are not prosecutions under the mail fraud statute. The inapplicability of such cases is pointed out in *Mathews* v. *United States* (C. C. A. 8th), 15 F. (2d), 139, 144, and the inapplicability of the case *Ex parte Bain*, *supra*, in particularly pointed out by this Court in the extracts from its opinion in the *Salinger case*, *supra*.

II

REVERSIBLE ERROR WAS NOT COMMITTED BY THE TRIAL COURT IN SUSTAINING AN OBJECTION TO THE QUESTION "WHERE DO YOU LIVE?" ASKED BY PETITIONER'S COUNSEL IN CROSS-EXAMINATION OF A WITNESS

The petitioner's specification of error on this point depends upon proceedings shown in the following extracts from the record (pp. 194–195, 198–199, 206):

Q. 1927. Where do you live, Mr. Bradley?

Mr. ARMSTRONG. That is objected to as immaterial and not proper cross-examination.

The COURT. I can not see the materiality.

Mr. FRIEDMAN. Why, I think the jury has a perfect right to know who the witness is, where he lives and what his business is, and we have the right to elicit that on cross-examination. I may say that this is the first witness the Government had called that they have not elicited the address from.

The COURT. I will sustain the objection.

Q. By Mr. FRIEDMAN. What is your business, Mr. Bradley?

A. My profession is an accountant, public accountant.

Q. What is your occupation now?

A. I am not doing anything at the present time on account of this case.

Q. On account of this case?

A. Yes.

Q. Do you live in Los Angeles?

Mr. ARMSTRONG. That is objected to as immaterial and invading the Court's ruling.

The COURT. I have ruled on that question.

Mr. FRIEDMAN. I will temporarily pass on to something else. I would like leave to submit authorities on my right to develop that on cross-examination. I haven't them with me.

The COURT. All right.

* * * * *

The jury were thereupon excused by the court until 9:30 o'clock on the morning of

July 24, 1929, whereupon the jury retired after which the following proceedings were had relative to the materiality of the testimony, as to the residence and place thereof of Cameron Bradley.

The COURT. So ordered. In what particular do you think that evidence is material?

Mr. FRIEDMAN. I think it is material for this purpose, first, not only on the general grounds I urged in asking the question, but on the additional grounds that I have been informed and caused to believe that this witness himself is now in the custody of the Federal authorities.

Mr. ARMSTRONG. You mean Mr. Bradley? You mean by the Federal authorities here?

Mr. FRIEDMAN. I don't know by what authorities, but that is my impression, that he is here in the custody of the Federal authorities. If that is so, I have a right to show that for the purpose of showing whatever bias or prejudice he may have.

The COURT. No; I don't think so. If you can prove he has ever been convicted of a felony, that is a different thing.

Mr. FRIEDMAN. I realize that is the rule. I may impeach him if he has been convicted of a felony.

The COURT. No. You may prove that fact as going to his credibility, but you can't merely show that he is detained or in charge of somebody. Everybody is presumed to be innocent until proven guilty.

Mr. FRIEDMAN. It is a violent presumption sometimes, I know.

> The COURT. Your defendant is certainly to be given the benefit of that presumption.
>
> Mr. FRIEDMAN. I have no doubt of that.
>
> The COURT. If that is all you have, I will have to stand on the ruling.

No exception to this ruling was taken at that time. On the following day, after various other matters had been discussed and the witness Bradley had been further cross-examined, counsel for petitioner said (R. 206):

> I would like, if the Court please, our exception noted to the Court's ruling made yesterday after the jury retired to the effect that we could not inquire as to the present address and residence of the witness.
>
> The COURT. Very well.

The exception taken by petitioner's counsel was directed to the ruling of the court made after the jury had retired. In the previous colloquies, he presented two reasons for the question submitted: (1) that the jury is entitled to know who the witness is, where he lives, and what his business is; and (2) that counsel had been informed that the witness was in the custody of the Federal authorities, and that he had a right to show such custody for the purpose of showing bias or prejudice.

The only questions asked by the counsel were "Where do you live?" and "Do you live in Los Angeles?" The ruling was upon objections to these questions which were sustained and the exception was to the exclusion of testimony responsive

to the questions. If what the court said indicated that objections to other questions would be sustained error could not be predicated upon what the court said in the absence of the jury and other questions should have been put to obtain a ruling to which exception could be taken. But no other questions were put. No attempt was made to question the witness as to his prejudice or bias, as to his being actually in custody, or as to whether any promise of immunity had been made. Counsel did not assert that he desired to impeach the witness by showing that his reputation for veracity in the place where he lived was bad, although now contending that this was his aim in asking the question. The contention now made appears to be an afterthought. All that counsel at any time represented to the court was that he wanted to show the *fact* of custody in order to establish bias and prejudice, and the ruling of the court was that he would not be permitted to attack the credibility of the witness by showing merely that he was in the custody of the Federal authorities.

The mere fact of custody would not warrant a jury in depreciating the credibility of a witness. Attacks on the credibility of a witness based on his being a criminal are limited to evidence of convictions, and questions relating to arrests, indictments, and other steps which may be preliminary to conviction are not permitted. *See Glover* v. *United States* (C. C. A. 8th), 147 Fed. 426, 429–430. Even conceding for the sake of argument that the

petitioner was entitled to show that the witness was in the custody of the Federal authorities, we insist that reversible error can be predicated upon the point only when questions appear in the record pertinently calculated to elicit the precise fact. No such questions were asked here.

The extent to which cross-examination may be carried for the purpose of attacking the credibility of a witness is largely in the discretion of the trial court, and such discretion is not ordinarily reviewable by an appellate court. *See Cochran* v. *United States*, 157 U. S. 286; *Blitz* v. *United States*, 153 U. S. 308, 312; *Johnston* v. *Jones*, 1 Black 209, 226; *Saccaro* v. *United States* (C. C. A. 9th), 27 F. (2d) 569; *Lemons* v. *United States* (C. C. A. 8th), 20 F. (2d) 490, 494; *Massaberg* v. *United States*, (C. C. A. 4th), 19 F. (2d) 62; *Edwards* v. *United States* (C. C. A. 8th), 18 F. (2d) 402.

In petitioner's briefs, many cases are cited to establish the right of a defendant to attack the credibility of the witnesses on cross-examination. But the actual decision usually adhered to the rule that the matter was one essentially in the sound discretion of the trial court. In *Yee Kim Yet Lee* v. *United States*, 197 U. S. 274, a new trial was granted by this Court because of the exclusion of a question asked of a witness on cross-examination. But there it clearly appeared that the question related to a matter which vitally affected the credibility of the witness and her motive in acting both as informer and as witness.

We submit that here no such situation exists. Early in the cross-examination of the witness, he testified that petitioner had had him arrested for embezzlement, but that he harbored no ill will or prejudice against petitioner. (R. 197.) Notwithstanding this testimony, petitioner made no effort to amplify his cross-examination by interrogating the witness as to promise of immunity, or to develop prejudice or bias of the witness through proper and appropriate questions.

III

NO ERROR WAS COMMITTED IN REFUSING TO GRANT PETITIONER'S REQUESTED INSTRUCTION NO. 10

The part of requested instruction which petitioner now relies upon is the following (R. 101-102):

> If you find that any promises made by the defendant were not fulfilled by him or that any representations as to future events did not occur as represented this, in and of itself, is not sufficient to establish the fact that the defendant did not intend to fulfill such promise or that he knew such representation to be false. In addition to the proof that such promise was not kept or that such representation was not fulfilled there must be evidence to establish the fact that the defendant knew at the time of making such promise or representation that it would not be fulfilled.

The record discloses that the court refused so to charge upon the ground that it was "substantially contained" in instructions given. (R. 402.)

The following excerpts from the charge make this plain (R. 381-392):

> * * * It is sufficient if you believe from the evidence beyond a reasonable doubt that the defendant devised the scheme as alleged in the indictment, that the same was, and was intended by him to be, a scheme to defraud as alleged, and that in furtherance thereof he sent out the letters or some of them described in Counts 1, 2, 5 and 6 of the indictment, to be sent or delivered through the post office establishment of the United States, whether such scheme was successfully carried out or not.
>
> If a man in good faith enters into a thing, in the honest belief that what he is doing is right and proper, he can not be convicted of crime, and if you believe that the defendant in this case was acting in good faith, he should be acquitted.
>
> * * * * * *
>
> **In this case the intention of the defendant is the very gist and substance of the fraud which must necessarily be embodied in the scheme or artifice as a foundation for the violation of the law. Without such fraudulent intention it would be impossible to devise a scheme or artifice to defraud.**
>
> * * * * *

The words "scheme" and "artifice" as used in the statute include any plan or course of action intentionally devised for the purpose of deceiving and tricking others, and thus fraudulently obtaining their money or property. * * * It is essential only that the scheme formulated be fraudulent in intent as alleged in the indictment.

* * * * *

* * * However, no promise or representation as to the future can constitute a criminally false representation unless it is made with the intent of it never being fulfilled.

* * * * *

It is, therefore, incumbent upon the Government to prove beyond a reasonable doubt the alleged scheme to defraud as set forth in the indictment and the use of the United States mail by the defendant for the purpose of executing ~~or attempting~~ to execute such scheme.

If from a consideration of all the testimony you are not convinced beyond a reasonable doubt that the defendant devised the scheme as set forth in the indictment or that he devised such scheme but ~~did~~ so without intent to defraud any person or persons, or if you are not convinced beyond a reasonable doubt that the defendant used the United States mails for the purpose of executing or attempting to execute such alleged scheme

to defraud, you must return a verdict finding the defendant not guilty.

* * * * *

In determining whether the plan or scheme set forth in the indictment was a plan or scheme to defraud, you are not to take into consideration your personal opinion as to whether said plan or scheme of operation was practicable or impracticable, or whether it was a plan of operation that you personally would or would not have participated in. Even though you are of the opinion that the scheme alleged to have been formulated by the defendant was impracticable or impossible to perform, you must nevertheless return a verdict finding the defendant not guilty should you find that such scheme was formulated by the defendant without any intent to defraud on his part and with his honest belief that the scheme was feasible and practical.

Good faith and lack of intent to defraud on the part of the defendant constitute a complete defense to each and all of the offenses charged in the indictment.

* * * * *

In determining whether or not the Government has proved the scheme to defraud as set forth in the indictment, I instruct you that any promise or representation made by the defendant, directly or indirectly, relating to the performance of some act in the future does not constitute a false or fraudulent pretense, representation or promise, even though such act was not performed

> by the defendant, if at the time of making such pretense, representation or promise the defendant was of the opinion and honestly believed that he could and would perform and fulfill such pretense, representation and promise.

The action of the trial court below in refusing the requested instruction was therefore justified under the applicable rule stated in *Sugarman* v. *United States*, 249 U. S. 182, 185, as follows:

> This passage in the charge clearly embodied the substance of the two requests made by the defendant. The judge was not obliged to adopt the exact language of the instructions requested, *Holt* v. *United States*, 218 U. S. 245, 253; nor was he obliged to repeat the instructions already given in substance. Compare *Bennett* v. *United States*, 227 U. S. 333, 339. * * *

Petitioner contends that the instruction given to the effect that "Every man is presumed to intend the natural and probable consequences of his acts" (R. 393) was "the equivalent of stating that if any promises were not fulfilled or performed he was presumed to have made them without any intent of fulfilling or performing them." (Supplemental brief, p. 29.) We submit that there is no such equation. No exception was taken to that part of the charge just quoted, and the passages of the charge quoted on page 21, *supra*, must have left the correct impression in the minds of the jury.

In this class of cases seldom can the intent of the defendant be proved directly. The circumstances of the case must themselves guide the jury on the question of the defendant's intent. The court here charged (R. 392):

> * * * intent is generally derived from and established by all the facts and circumstances surrounding the person doing the act complained of, as disclosed by the evidence. In order for you to determine in this case the question of intent, you will look at all the evidence, oral and documentary, in the case.

The jury were entitled to consider, on the question of intent, the failure of fulfillment of petitioner's promises.

IV

NO PREJUDICIAL ERROR WAS COMMITTED BY THE TRIAL COURT IN THAT PART OF ITS CHARGE WHICH MENTIONED REPRESENTATIONS REGARDING PETITIONER'S OWNERSHIP OF THE LAND INVOLVED

That portion of the charge which petitioner alleges to be erroneous reads as follows (R. 386):

> If the defendant intended to and did devise the scheme or artifice, as alleged, and did make false and fraudulent representations and assurances for the purpose of deceiving persons with respect to his ownership of the land in Cimarron County, Oklahoma, and of obtaining money by means of such false representations and pretenses, and for the purpose of executing such scheme, or attempting so to do, did place or cause to be placed the

> letters set forth in the several counts of the indictment in any post office or mail box of the United States in Los Angeles County, California, to be sent or delivered by the post office establishment of the United States, as alleged, then a subsequent ultimate intent to reimburse the investor or investors would by no means furnish a condonation or legal excuse for the false representations. It may, however, be considered by the jury in connection with all the other evidence in the case in determining whether or not such representations, if made, were made with the intent to defraud as charged.

Petitioner argues that as the indictment did not specifically allege the making of false representations as to ownership of land, the above language should not have been used in the charge.

In order to obtain a reversal of the judgment below, petitioner must establish not only that the instruction was erroneous, but that it was also prejudicial. In determining the question of prejudice, one must read the court's charge as a whole. If the jury could not have been misled, the error, if any, becomes immaterial. See *Burns* v. *United States*, 274 U. S. 328, 331–332; *Northern Pacific Railroad* v. *Babcock*, 154 U. S. 190, 201.

The charge as a whole gave the jury to understand that they were confined strictly to the fraudulent scheme described in the indictment.

In addition to the excerpts from the charge set forth under Point III of this brief (pp. 19–22, *supra*), the following are typical (R. 389, 390, 391):

> It is, therefore, incumbent upon the Government to prove beyond a reasonable doubt the alleged scheme to defraud as set forth in the indictment and the use of the United States mail by the defendant for the purpose of executing or attempting to execute such scheme.
>
> If from a consideration of all the testimony you are not convinced beyond a reasonable doubt that the defendant devised the scheme as set forth in the indictment or that he devised such scheme but did so without intent to defraud any person or persons, or if you are not convinced beyond a reasonable doubt that the defendant used the United States mails for the purpose of executing or attempting to execute such alleged scheme to defraud, you must return a verdict finding the defendant not guilty.
>
> * * * * *
>
> It is not sufficient that the Government merely prove the physical facts alleged to constitute the scheme to defraud as set forth in the indictment. But in addition thereto the Government must prove beyond a reasonable doubt that such scheme was devised by the defendant with the specific intent to defraud the persons designated in the indictment. * * *
>
> * * * * *

> Before you can find the defendant guilty on any count of said indictment, it must be established to your satisfaction and beyond a reasonable doubt that the identical scheme alleged in the indictment or a substantial portion thereof existed. You can not find the defendant guilty on any count of the indictment upon proof that some other scheme or some scheme other than that alleged in the indictment was devised or formulated by him.

All of the part of the charge just quoted followed the part of which petitioner complains. At the conclusion of the charge the jury asked that the indictment be given them to read, and apparently they took it to their conference. (R. 398–399.)

Moreover, the following allegations in the indictment may fairly be interpreted to charge fraudulent representations in regard to petitioner's ownership of the lands involved in his fraudulent scheme (R. 4–5):

> It was further a part of said scheme and artifice that the defendant would not exercise the option to purchase any of the land hereinbefore described nor to obtain title to any part thereof.
>
> It was further a part of said scheme and artifice that the defendant should and he did, without having title thereto, sell and offer for sale parcels and tracts of land from and out of the tract of land hereinbefore described and to which he had an option as aforesaid.

> It was further a part of said scheme and artifice that he should and did pretend and represent to the persons to be defrauded that should the persons to be defrauded pay for the parcels and tracts of land included in the tract hereinbefore described and to which the defendant had an option as aforesaid, that he, the said defendant, would deliver to the persons to be defrauded a grant deed giving them fee title to the land paid for by them as aforesaid, when in truth and in fact the defendant did not intend to and did not in any instance deliver a deed to any of the persons to be defrauded who had paid the said defendant moneys in exchange for parcels and tracts of land included in the tract hereinbefore described and to which the defendant held an option as aforesaid.

See also false representations contained in circulars described in the indictment. (R. 7.)

The word "ownership," as used by the trial court, may well be regarded as referring to the interest in the land which petitioner gave his victims to understand he would convey to them. Cf. *Bowers* v. *United States* (C. C. A. 9th) 244 Fed. 641, 649.

It would seem to follow that the instruction was not erroneous, and that in no event did prejudice result.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

STATUTE INVOLVED

Section 215 of the Criminal Code, c. 321, 35 Stat. 1088, 1130-1131, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

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